

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

WAYNE BERRY,

Plaintiff,

vs.

DEUTSCHE BANK TRUST COMPANY  
AMERICAS (FKA BANKERS TRUST  
COMPANY) and JP MORGAN CHASE  
BANK in their separate capacities and as  
agents for the pre- and post-petition Lender  
Defendants of Fleming Companies, Inc.;  
GENERAL ELECTRIC CAPITAL  
CORPORATION; C&S WHOLESALE  
GROCERS, INC.; THE POST-  
CONFIRMATION TRUST OF FLEMING  
COMPANIES, INC.; ROBERT KORS;  
CORE-MARK HOLDINGS INC. AND DOES  
1 TO 200,

Defendants.

Case No. 01:07 CV 7634 (WHP)

ECF Case

AFFIDAVIT OF ERIN N. BRADY IN SUPPORT OF DEFENDANTS  
POST CONFIRMATION TRUST'S AND ROBERT KORS' MOTION FOR  
SANCTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 11

KIRKLAND & ELLIS LLP  
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Counsel for Defendants Fleming Post Confirmation  
Trust and Robert Kors

**AFFIDAVIT OF ERIN N. BRADY**

I, ERIN N. BRADY, testify as follows:

1. I am a partner at the law firm Kirkland & Ellis LLP. My firm has been retained to represent Defendants the Post Confirmation Trust ("PCT") and Robert Kors in this lawsuit. I have personal knowledge of the facts set forth herein and, if called to testify, could and would testify competently thereto.

2. Attached as Exhibit A is a true and correct copy of a December 18, 2007 letter sent by Plaintiff's attorney, Timothy Hogan, to the Hawaii Office of Disciplinary Counsel.

3. Attached as Exhibit B is a true and correct copy of relevant excerpts from email discussion threads between Plaintiff's attorney, Timothy Hogan, and Michael Baumann and others ranging from January 16, 2008 to January 30, 2008.

4. Attached as Exhibit C is a true and correct copy of relevant excerpts from email discussion threads between Plaintiff's attorney, Timothy Hogan, and Michael Baumann and others ranging from February 27, 2008 to February 28, 2008.

5. Attached as Exhibit D is a true and correct copy of a transcript of a February 13, 2008 hearing in the Southern District of New York.

6. Attached as Exhibit E is a true and correct copy of a transcript of an August 4, 2003 hearing in the Delaware Bankruptcy Court.<sup>1</sup>

7. Attached as Exhibit F is a true and correct copy of excerpts of a June 27, 2005 Summary Judgment Order from the Second Fleming/Berry litigation.<sup>2</sup>

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<sup>1</sup> All references to the Delaware Bankruptcy Court refer to *In re Fleming Companies, et al.*, Case No 03-10945 (MFW), which Fleming filed in the Bankruptcy Court for the District of Delaware on April 1, 2003.

8. Attached as Exhibit G is a true and correct copy of the December 4, 2006 Report of Special Master regarding attorneys' fees and costs from the Second Fleming/Berry litigation.

9. Attached as Exhibit H is a true and correct copy of the October 25, 2006 Report of Special Master regarding attorneys' fees and costs from the Second Fleming/Berry litigation.

10. Attached as Exhibit I is a true and correct copy of a proof of claim filed by Wayne Berry on October 6, 2004 in the Delaware Bankruptcy Court.

11. Attached as Exhibit J is a true and correct copy of a December 24, 2004 letter sent by Wayne Berry to Craig Bichette of Fleming Companies, Inc., and forwarded to Kirkland & Ellis LLP.

12. Attached as Exhibit K is a true and correct copy of relevant excerpts from email discussion threads between Plaintiff's attorney, Timothy Hogan, and Michael Baumann and others ranging from February 15, 2008 to February 16, 2008.

13. Attached as Exhibit L is a true and correct copy of a January 9, 2008 letter with exhibits sent by Plaintiff's attorney, Timothy Hogan, to the Hawaii Office of Disciplinary Counsel.

14. Attached as Exhibit M is a true and correct copy of the Hawaii District Court's July 12, 1999 Order in *Sea-Land Serv., Inc. v. Atl. Pac. Int'l, Inc.*, 61 F.Supp.2d 1102 (D. Haw. 1999).

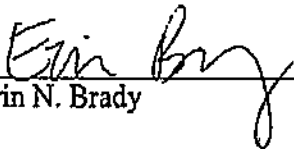
15. Attached as Exhibit N is a true and correct copy of excerpts of a January 26, 2005 Summary Judgment Order from the Second Fleming/Berry litigation.

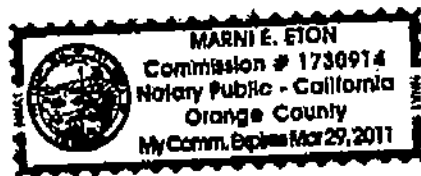
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<sup>2</sup> All references to the Second Berry/Fleming litigation refer to *Wayne Berry v. Hawaiian Express Services, et al.*, Civ. No. CV 03-00385 SOM-LEK, which Berry filed in the District of Hawaii in July 2003.

16. Attached as Exhibit Q is a true and correct copy of a Declaration submitted by Wayne Berry in the Second Fleming/Berry litigation

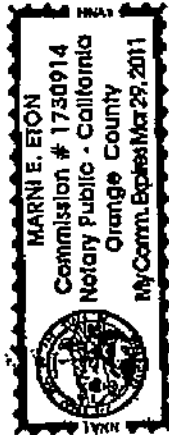
So sworn under penalty of perjury under the Laws of the United States of America in  
Dana Point, California, April 7 2008.

  
Erin N. Brady



**JURAT**

State/Commonwealth of California } ss.  
 County of Orange



Subscribed and sworn to (or affirmed) before me

this 7<sup>th</sup> day of April, 2008, by

(1) Erin Nicole Brady

Name of Signer #1

(2)

Name of Signer #2

Marni E. Eton

Signature of Notary Public

Marni E. Eton

Other Required Information (Printed Name of Notary, Residence, etc.)

Place Notary Seal and/or Any Stamp Above

### OPTIONAL

Though the information in this section is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

### Description of Attached Document

Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

RIGHT THUMBPRINT  
OF SIGNER #2

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RIGHT THUMBPRINT  
OF SIGNER #1

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